

1 THE HONORABLE RICARDO S. MARTINEZ
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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 WESTERN TOWBOAT COMPANY,

11 Plaintiff,

12 v.

13 VIGOR MARINE, LLC,

Defendant.

IN ADMIRALTY

Case No. 2:20-cv-00416-RSM

VIGOR'S CORRECTED SURREPLY

14 Vigor submits this surreply pursuant to LCR 7(g) to address Western's request to
15 strike Vigor's expert declarations and exhibits. *See* ECF No. 55 at pgs. 4-7. This surreply is
16 based on the facts set forth in the Declaration of David Boyajian, filed herewith.

17 **SURREPLY**

18 Vigor admittedly failed to meet the Court's March 5 deadline to disclose expert
19 reports.¹ However, under Fed. R. Civ. P. 37(c)(1), the Court has broad discretion to excuse
20 Vigor's late disclosure where Vigor can show that it was substantially justified or harmless.
21 In *Lanard Toys, Ltd. v. Novelty, Inc.*, 375 Fed. App'x. 705, 713 (9th Cir. 2010), the Ninth
22 Circuit explained that Rule 37(c)(1) did not "strip the district courts of discretion to allow
23 expert testimony in appropriate circumstances; to the contrary, it contains an express

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26 ¹ As described in the Boyajian Declaration, Vigor did produce reports to Western and make its witnesses available in advance of filing for summary judgment.

exception under which a failure timely to serve an expert report may be excused if the failure was substantially justified or is harmless.” There are four factors to consider in determining whether a violation was justified or harmless: (1) prejudice or surprise to the party against whom the evidence is offered; (2) the ability to cure the prejudice; (3) the likelihood of disruption of trial; and (4) bad faith or willfulness in the untimely disclosure. *Id.* (finding no abuse of discretion in court’s decision to allow late disclosed experts to testify).²

This is not a case where a party sought to gain a strategic advantage or failed to act diligently. Mr. Boyajian’s declaration shows that Vigor justifiably believed that the parties agreed to informally amend the deadlines to accommodate Westerns’ delayed production of witnesses. Western knew well in advance who Vigor’s experts were, their areas of expertise, and that Vigor intended to produce its expert reports after deposing Westerns’ witnesses—something Vigor first sought to do months before the disclosure deadline. The parties had multiple discussions about the timing issues given Westerns’ delay. In the end, Vigor produced its reports one to seven weeks late, shortly after Western finally produced its fact witnesses, and several months before trial. Western has declined open offers to depose Vigor’s experts, both before and after the discovery window closed. Thus, there was no surprise or prejudice to Western and the first *Lanard Toys* factor weighs in favor of allowing Vigor’s experts to testify. (These facts also support a finding of harmlessness).

Similarly, there remains opportunity for Western to cure any alleged prejudice from Vigor’s tardy disclosure. Western declined offers to depose these witnesses after receipt of

² Using the *Lanard Toys* analysis, numerous courts have declined to exclude expert testimony. *Holen v. Jozic*, 2018 U.S. Dist. LEXIS 188479 at * 12-13 (W.D. Wash. Nov. 2, 2018) (untimely disclosure was harmless where, among other factors, the violating party stipulated to allow the other party to depose the witnesses after the discovery deadline, the parties had agreed to conduct additional discovery beyond the deadline, and the reports were only one month late); *Smugglers Cove, LLC v. Aspen Power Catamarans, LLC*, 2020 U.S. Dist. LEXIS 26337 at *4-5 (W.D. Wash. Feb. 14, 2020); *Harris v. Amtrak*, 2020 U.S. Dist. LEXIS 7253 at *5-9 (W.D. Wash. Jan. 15, 2020); *Edwards v. Nike Retail Servs.*, 2012 U.S. Dist. LEXIS 157822 at *14-15 (E.D. Cal. Nov. 2, 2012).

1 their full reports, an indication that they do not need these depositions. Nevertheless, there
 2 are five weeks before trial and Vigor is willing to produce these witnesses at Western's
 3 convenience. The second *Lanard Toys* factor should also weigh in favor of excusing Vigor's
 4 late disclosure.

5 As to the third factor, there can and will be no disruption of trial. This Court has
 6 already denied Vigor's request for an extension.

7 Finally, as the Boyajian Declaration makes clear, there was no bad faith or
 8 willfulness in Vigor's late disclosure. It was based on an understanding (or
 9 misunderstanding) that the parties had agreed to cooperate to schedule depositions around
 10 Westerns' working schedules and to informally amend the expert deadline accordingly.
 11 While Vigor's conduct was not faultless, there is no indication of bad faith or willfulness.

12 Even where a violation of Rule 26 is not substantially justified or harmless, the rules
 13 do not require the severe sanction of exclusion. Rule 37(c)(1) makes clear that "instead of"
 14 exclusion, the court may order payment of the reasonable expenses caused by the failure or
 15 may impose "other appropriate sanctions." Courts have broad discretion to fashion a remedy
 16 that fits the circumstances. *Koho v. Forest Labs. Inc.*, 2015 U.S. Dist. LEXIS 180860 (W.D.
 17 Wash. March 31, 2015) ("the appropriate remedy for plaintiff's noncompliance with Rule 26
 18 is not the exclusion of Healy's testimony. Instead, plaintiff must submit a revised and more
 19 extensive expert report . . . and Healy must submit to a deposition of up to three hours"). To
 20 prohibit Vigor from relying on its experts in these circumstances is too severe a sanction for
 21 conduct arising from a genuine misunderstanding. Should the Court find sanctions are
 22 warranted, Vigor submits that sanctions in line with *Koho* would be more appropriate.

23 CONCLUSION

24 Vigor respectfully requests that the Court deny Western's attempt to exclude Vigor's
 25 witnesses and, under these unique circumstances, exercise its discretion to allow Vigor's
 26 experts to testify.

VIGOR'S CORRECTED SURREPLY: 2:20-cv-00416-
 RSM - 3

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1 Dated this 24th day of May, 2021.

2 SCHWABE, WILLIAMSON & WYATT, P.C.
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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on 24th day of May, 2021, I served the following VIGOR'S
3 CORRECTED SURREPLY on:

4 Anthony J. Gaspich
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14 by electronically filing the foregoing with the Clerk of the Court using the
15 CM/ECF system, which will send notification of such filing to all associated counsel.

16 _____
17 /s/ *Molly J. Henry*
18 Molly J Henry

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